Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Petition of United States Telecom Association and CTIA-The Wireless Association® for Declaratory Ruling Clarifying Certain Aspects of the "Lowest Corresponding Price" Obligation of the Schools and Libraries Universal Service Program	)	WC Docket No. 02-6

COMMENTS OF SHEPHERD, FINKELMAN, MILLER & SHAH, LLP ON PETITION FOR DECLARATORY RULING DATED MARCH 19, 2010

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SUMMARY

When the Commission released its Report and Order on Universal Service dated May 8, 1997, it outlined and addressed, in great detail, the requirements of the E-Rate Program. *See*, FCC 97-157 (hereinafter "1997 Universal Service Order"). In thirteen (13) years since, neither the Petitioners nor any of their members (telecommunications service providers) filed any petitions with the Commission seeking declaratory relief on the matters they now raise, all of which relate to a service provider's fundamental obligation not to overcharge the federal government (or schools and libraries) or seek reimbursement for charges that exceed the "lowest corresponding price" ("LCP") as defined for purposes of the E-Rate Program. *See*, 47 C.F.R. § 54.500(f) (defining LCP).

Now, as the Petitioners admit, the Universal Service Administrative Company ("USAC") is in the process of auditing some of the Petitioners' members (service providers) and requesting that they substantiate certifications of regulatory compliance, which they must make at least annually by filing FCC Form 473. Petition for Declaratory Ruling dated March 19, 2010 ("Petition"), p. ii (USAC "recently began to test for lowest corresponding price in some audits"). Apparently knowing that they have not complied with the LCP requirement for years, these service providers (through the Petitioners) filed the Petition in an effort to avoid responsibility for filing false Form 473 certifications by suggesting that some "clarification" of the LCP requirement is suddenly needed.

The Commission's 1997 Universal Service Order clearly addresses the questions raised by the Petition. *See*, 1997 Universal Service Order, ¶¶ 484-491. No clarification is necessary, and the service providers should not be allowed to avoid responsibility for their false certifications simply because they chose to ignore the Commission's prior orders and rulings, or otherwise failed to take their LCP obligations seriously. The Commission has been clear on the issues presented, and the Petitioners' positions are not supported by any

reasonable interpretation of the governing statute, administrative rules, or any of the prior orders or rulings of the Commission. Accordingly, the Petition should be denied in its entirety.

First, the Petitioners assert that the LCP requirement only applies where competitive bids have been sought by a school or library using FCC Form 470. Petition, p. ii. This position finds absolutely no support whatsoever in the law. For starters, the Telecommunications Act of 1996 ("1996 Act") unambiguously requires that *all* service providers seeking reimbursement under the E-Rate Program charge schools and libraries "at rates *less than* the amounts charged for similar services to other parties." 47 U.S.C. § 254(h)(1)(B)(emphasis provided). Similarly, the Commission mandated that *all* service providers charge prices that do not exceed the LCP, which is defined as "the lowest price that a service provider charges to non-residential customers who are similarly situated to a particular school, library or library consortium for similar services." *See*, 47 C.F.R. §§ 54.500(f) and 54.511(b) (mandating that service providers "shall not charges schools…a price that is above the lowest corresponding price…"). The clear purpose of requiring a service provider to charge no more than its LCP is to ensure that the service provider does not overcharge the federal government, schools and libraries. Nonetheless, the Petitioners now suggest that the Commission should ignore and effectively write this critical LCP requirement out of the law by ruling, in their words, "that the lowest corresponding price applies only to competitive bids submitted by a provider in response to a Form 470." Petition, p ii. As set forth herein, such a ruling would: (1) be inconsistent with the plain language of the 1996 Act, 47 U.S.C. §254(h)(1)(B); (2) be inconsistent with the plain language of E-Rate regulations, including 47 C.F.R. §§54.500(f) and 54.511(b); and (3) allow telecommunications service providers to avoid the LCP requirement with respect to the vast majority of their charges, thereby not only sanctioning their historical overcharges, but

giving them free rein to continue overcharging the federal government, schools and libraries in the future, contrary to the fundamental purpose of E-Rate.

Second, the Petitioners ask the Commission to "clarify" that LCP is not a "continuing obligation that entitles a school or library to a constantly recalculated lowest corresponding price during the term of the contract." Petition, p. iii. This request ignores the controlling framework for E-Rate reimbursement requests. When a service provider files Form 473 and seeks reimbursement from the federal government, it certifies compliance with applicable E-Rate rules, including the LCP requirement. *See*, 1997 Universal Service Order, ¶ 487 (requiring service providers to certify LCP as a condition of seeking E-Rate reimbursement); *see also*, Instructions to FCC Form 473, p. 1 (Form 473 must be completed by each service provider "to confirm that the invoice forms submitted by each service provider are in *compliance with the FCC's rules* governing the schools and libraries universal service support mechanism") (emphasis supplied). Indeed, a servicer's provider's certification of LCP compliance is a *condition of receiving funds*. As the Commission plainly stated in 1997:

> [W]e agree with the Joint Board's recommendation that, *as a condition of receiving support*, carriers be *required to certify* that the price they offer to schools or libraries is no greater than the lowest corresponding price based on the prices the carrier has previously charged or is currently charging in the market.

1997 Universal Service Order, ¶ 487 (emphasis supplied). As a result, any service provider that chooses to participate in E-Rate and seeks reimbursement under the program must enter into contracts with school and library customers knowing that it cannot charge them more than LCP. Whether a service provider offers services to schools and libraries on a multi-year, annual or some other periodic basis, it knows (and has known since 1997) that its contracted price must not exceed LCP (as of the date of the contract) if it intends to seek E-Rate reimbursement from USAC. For example, an incumbent local exchange carrier

("LEC") that annually renews a one-year contract to provide local calling (or "dial tone") services to a school does so knowing that it cannot charge the school more than the LCP as of the contract renewal date. If a service provider's prices for those services increased during the last contract year, then the LCP might also go up at the time of contract renewal. If industry prices for such service decreased, however, then the federal government, schools and libraries are entitled to benefit from that reduction in LCP. To suggest, as Petitioners do, that a service provider can lock a school or library into a rate under a one-year (or multiple year) contract, and then ignore changes in LCP each time the contract comes up for renewal, finds no support in the applicable statute or regulations.

Third, the Petitioners' suggestion that service providers need not maintain any records or follow any procedures to ensure compliance with LCP requirements is also unsupportable. Both Congress and the Commission have made it abundantly clear that service providers have a duty to charge schools and libraries no more than LCP. 47 U.S.C. § 254(h)(1)(B); 47 C.F.R. §54.511(b). In addition, the 1997 Universal Service Order plainly states that services providers (*not* schools) must certify compliance with the LCP requirement "as a condition of receiving support" under E-Rate. 1997 Universal Service Order, ¶ 487. To suggest, as Petitioners apparently do, that service providers need not comply with the LCP requirement because there are no "specific procedures that a service provider must use to ensure compliance" is entirely irresponsible, particularly where service providers receive many millions of dollars in revenue from the federal government annually under E-Rate. Petition, p. iii. The 1997 Universal Service Order and the Instructions to Form 473 are clear – a service provider seeking payment from the federal government under E-Rate must certify compliance with program rules, including the LCP requirement. This should come as no surprise whatsoever to the service providers. They are highly regulated entities, and they certainly understand the importance of putting

procedures in place to demonstrate compliance with the law. If a service provider has made no serious effort to document or ensure compliance with the LCP requirement before making false or misleading Form 473 certifications, then that is simply inexcusable and not a basis for ignoring existing law.

Fourth, the Petitioners suggest that the service providers' practice of "bundling" telecommunications services makes it impossible for them to certify compliance with the LCP requirement. Petition, p. iii. Like their other arguments, this one finds no support in the law. The Commission has made it abundantly clear that service providers *cannot* avoid LCP obligations due simply to the bundling of services or products. As the Commission stated in the 1997 Universal Service Order:

> Providers may not avoid the obligation to offer the lowest corresponding price to schools and libraries…by arguing that none of their non-residential customers are *identically* situated to a school or library or that none of their service contracts cover services *identical* to those sought by a school or library. Rather we *only* permit providers to offer schools and libraries prices above the prices charged to other similarly situated customers *when those providers can show* that they face significantly higher costs to serve the school or library seeking service [as compared to the costs incurred to service the similar customer].

1997 Universal Service Order, ¶ 488 (emphasis supplied). In addition, the 1996 Act and E-Rate regulations clearly state that, when a service provider determines the pre-discount price (LCP) to be charged to its school and library customers, it must consider the prices that it charges to similar non-residential customers for *"similar"* (but not necessarily identical) services. *See*, 47 U.S.C. § 254(h)(1)(B)(referencing charges for "similar services"); 47 C.F.R. §54.511(b)(also referencing charges for "similar services"). Where two similar customers receive similar or identical services (*i.e.*, basic monthly per-line charges, or "dial tone"), then prices charged by that provider to those customers must be considered by the provider when determining LCP. If the Petitioners' position on bundling was accepted, then service providers could routinely avoid compliance with the LCP requirement by

asserting that there is always some difference (even a modest one) between two "bundles" of services provided to two customers (*i.e.*, one has more telephone extensions, or one has some ancillary service that the other does not have). The Commission should not accept the Petitioners' invitation to "water down" or effectively write the LCP requirement out of the law, as this would be contrary to the plain language of the relevant statute and regulations.

Fifth, and finally, the Petitioners suggest that a service provider does not need to comply with E-Rate requirements (including its obligation to provide truthful certifications concerning LCP) unless schools and libraries first prove that service providers charged them more than LCP. Petition, p. iv. Again, this self-serving proposition is not supported by the language of the 1996 Act or E-Rate regulations, and it is inconsistent with the 1997 Universal Service Order and basic principles of law enforcement. If a service provider violates the law by knowingly making false and misleading certifications to the federal government, it should not be excused from that liability simply because a school or library was ill-equipped to catch them violating the law. As set forth above, the 1997 Universal Service Order clearly states that *service providers* cannot charge more than LCP unless "*those providers* can show" that the LCP requirement should *not* apply. 1997 Universal Service Order, ¶ 488 (emphasis supplied). The burden is *not* on the schools to uncover a service provider's false certifications and overcharging activity, and there is simply nothing in the 1996 Act, the E-Rate regulations, or the 1997 Universal Service Order, suggesting that a *service provider's* LCP obligation is not triggered unless or until a school first proves it is not receiving LCP. Notably, from the standpoint of law enforcement, the entity most capable of knowing whether a particular school or library is receiving a service provider's LCP (which varies from provider to provider) is the service provider itself, which has ready access to pricing information for all of its customers (something not generally available in the public domain, or otherwise available to individual schools and libraries).

Put simply, when a service provider seeks reimbursement from the federal government under E-Rate, it certifies compliance with the LCP requirement, and it cannot avoid the legal import of that certification by suggesting that a school or library (or the federal government) should have known it was being overcharged, or that a school or library arguably failed to file a Form 470 or comply with its own regulatory obligations. The service provider's certification of regulatory compliance turns on what the service provider knew and what it did to determine if it was truly charging LCP, not what others (*i.e.*, schools and libraries) might know or do. If service providers have made knowingly false certifications to the government on a routine basis over many years, without even attempting to determine if they were charging schools, libraries and the federal government the LCP (as appears to be the case), then they have only themselves to blame.

For approximately thirteen (13) years, the Petitioners and their service provider members did not file petitions with the Commission seeking any declaratory relief or clarification on the above issues, but instead repeatedly certified LCP compliance and sought payment from the federal government, despite knowing that their certifications were false. Granting the Petitioners the relief they seek now would not serve the interests of justice and would necessarily: (1) require the Commission to provide declaratory relief that ignores and is contrary to clearly established E-Rate law, including the statute, regulations and orders that have existed since at least 1997; (2) make all of the service providers' historical certifications of regulatory compliance, including compliance with LCP, essentially meaningless; and (3) potentially restrict or limit the federal government's ability to recover many millions of dollars in E-Rate overcharges from service providers.

For these reasons, and as set forth in greater detail below, the Petition should be denied in its entirety. The declaratory relief that the Petitioners seek is not proper or necessary. *See*, 5 U.S.C. § 554(e) (Commission has broad discretion in determining whether

to provide declaratory relief); 47 C.F.R. § 1.2 (same). Alternatively, if the Commission decides to address any of the matters presented by the Petition, it should declare that the issues presented do not require "clarification," as they are addressed by the clear language of the 1996 Act, the E-Rate regulations and the 1997 Universal Service Order. To accept the Petitioners' false premise (that E-Rate law on these issues is not already clear) would only serve to undermine USAC's ongoing efforts to audit service providers and to ensure LCP compliance, both historically and in the future.

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BACKGROUND

When Congress enacted the 1996 Act, it included schools and libraries among the beneficiaries of universal service support, and made it clear that the overarching purpose of E-Rate (also known as the Schools and Libraries Universal Service Program) is "to ensure that schools and libraries have affordable access to modern telecommunications and information services that will enable them to provide educational services to all parts of the nation." 1997 Universal Service Order, ¶ 424. In addition, in 1997, the Commission made it clear that "schools and libraries should be given the *maximum flexibility* to purchase the package of services they believe will most effectively meet their communication needs." 1997 Universal Service Order, ¶ 425 (emphasis supplied).

To put this Petition in context, it is important to note that the obligation to certify compliance with LCP rests entirely with *service providers*, not schools or libraries. 1997 Universal Service Order, ¶ 487. Schools and libraries often have an obligation to file FCC Form 470 to initiate a competitive bidding process (in some, but certainly not all, cases), but, in the end, schools and libraries are given "maximum flexibility" to decide what packages of services best suit their needs. *Id.*, ¶ 425. Given this basic framework, it is evident that schools and libraries do not always need to choose the lowest cost service provider, particularly if they have valid concerns that the provider cannot adequately meet their telecommunications needs. *See*, 47 C.F.R. § 54.511(a) (price is the "primary factor," but it is not the only relevant factor in choosing a service provider); *see also*, 1997 Universal Service Order, ¶ 482 (declining to impose specific "bidding requirements" on schools and libraries). *However*, when a particular service provider is in fact chosen by a school or library to provide services (often after the service provider has touted the benefits of E-Rate in the process of soliciting the school or library), then that service provider has a clear legal obligation not to charge the school or library more than the provider's LCP. 47 C.F.R. §

54.511(b) (providers "shall not" charge more than LCP). Moreover, when a service provider files Form 473 with the federal government to obtain reimbursement of its charges under E-Rate, the service provider (not the school or library) is certifying *its own* compliance with E-Rate law – specifically, the LCP requirement. 1997 Universal Service Order, ¶ 487 (requiring service providers to certify LCP as a condition of obtaining E-Rate reimbursement); *see also*, Instructions to FCC Form 473, p. 1 (Form 473 must be completed by each service provider "to confirm that the invoice forms submitted by each service provider are in *compliance with the FCC's rules* governing the schools and libraries universal service support mechanism") (emphasis supplied).

In a transparent attempt to shift the focus and blame for the service providers' own legal noncompliance to the schools and libraries, the Petitioners assert that a service provider's duty to certify compliance with the LCP requirement "applies only to competitive bids submitted by a provider in response to a Form 470." Petition at ii. As set forth herein, this narrow interpretation of a service provider's obligation to certify LCP compliance finds no support whatsoever in E-Rate law. Under the 1996 Act, a service provider has a clear statutory duty to charge schools and libraries (and the federal government) "at rates *less than* the amounts charged for similar services to other parties." 47 U.S.C. § 254(h)(1)(B)(emphasis provided). Similarly, the Commission has mandated that service providers charge schools and libraries (and the federal government) no more than their own LCP, which it defined as "the lowest price that a service provider charges to non-residential customers who are similarly situated to a particular school, library or library consortium for similar services." 47 C.F.R. §§ 54.500(f) and 54.511(b). As the 1996 Act and regulations plainly demonstrate, a service provider's duty to certify LCP compliance is clear and unequivocal, and is not contingent on the actions or conduct of schools or libraries.

The Petitioners' requested relief (*i.e.*, an order declaring that the LCP requirement does not apply to service providers unless a school or library first files Form 470) also ignores the fact that many (perhaps even most) service contracts and/or contract renewals between telecommunications providers and schools/libraries may not even require the filing of Form 470. Indeed, the Instructions to Form 470 provide that the form is not necessary in many cases:

> Beginning with the application process for the Funding Year 2000…, you are required to file Form 470 in the current application period *only if* you are applying for discounts for one of the following types of services:
>
> - Tariffed or month-to-month services for which you do not have a signed, written contract.
> - Services for which a new written contract is sought for the funding year [at issue]. Services under a multi-year contract signed on or before July 10, 1997 but for which no Form 470 has been filed in a previous program year.
>
> …Services covered by a **qualified existing contract** for all or part of the funding year, including multi-year contracts signed pursuant to the posting of a Form 470 in a previous funding year, *do not require the filing of a Form 470*, since you are not seeking bids for these services. A qualified existing contract is:
>
> - a signed, written contract executed pursuant to the posting of a Form 470 in a previous funding year, OR
> - a contract signed on or before 7/10/97 and reported on a form Form 470 in a previous year as an existing contract.

Instructions to FCC Form 470, p. 4 (bolding in original, italics supplied); *see also* 47 C.F.R. § 54.511(c) (concerning "existing contracts"). Accordingly, when a service provider proposes or enters into a "qualified existing contract" for services (*i.e.*, for monthly line charges/"dial tone" or local calling), the school or library does ***not*** need to complete or file Form 470. *Id.* As a result, a large portion (if not the vast majority) of all service contracts and contract renewals between service providers and schools/libraries may actually fall within this definition of "qualified existing contract," *for which the filing of a Form 470 is not required.*

Nearly every written contract or contract renewal between a service provider and a school/library could be a "qualified existing contract" so long as a Form 470 was posted in a previous year. *Id.* As a result, such contracts may actually be renewed year after year, without any Form 470 being filed. *Id.* This is particularly true when there is no significant competition in the market for the services at issue, such as where an incumbent LEC controls the geographic market for monthly line charges (dial tone) and local calling. As a practical matter, this means that the charges that often make up the *largest part of a school district's monthly phone bills* (*i.e.*, monthly lines charges/dial tone and local calling) might ordinarily be provided under "qualified existing contracts," for which no Form 470 is required. Accordingly, if the Petitioners' position was accepted (although it finds no support in the 1996 Act or E-Rate regulations), then the bulk of the charges that schools pay each month for telecommunications services may *not* be subject to an LCP requirement because, in the Petitioners' words, "the lowest corresponding price applies only to competitive bids submitted by a provider in response to a Form 470." Petition at ii.

Given this background, it becomes clear why the Petitioners are seeking the declaratory relief being requested here. They would like the Commission to give them a "green light" to continue overcharging schools and libraries, without regard for their own LCP obligations. While it may be an effective political or litigation strategy to attempt to shift the focus to and blame (for their own legal noncompliance) to schools and libraries, the simple fact is that the relief being sought in the Petition is not consistent with the 1996 Act or E-Rate regulations, and the Commission should not support any effort to undermine the recent USAC audits of service providers by allowing the Petitioners to confuse the issues in this manner.

Accepting the Petitioners' views (including their assertion that service providers have no obligation to charge LCP to the federal government, schools or libraries unless a

school or library files a Form 470) would dramatically alter the E-Rate landscape and severely restrict USAC's efforts to enforce compliance with the law. Such a dramatic change to existing law would not only be contrary to the 1996 Act and subsequent regulations, which by their clear language do *not* condition a service provider's duty to charge LCP on a school's filing of a Form 470 (or any other act by a school or library), but would also severely undermine the entire E-Rate Program, and open the door to even greater overcharging and fraud on the government. If the E-Rate law is to be changed in this manner, an Act of Congress would be necessary, and it is highly doubtful that any such legislation would pass, for obvious reasons. The Commission should not accept the Petitioners' invitation to do what the service providers know they cannot realistically accomplish (substantially changing E-Rate law and altering the framework of the program) through the legislative process. Service providers should not be given an excuse or license to overcharge the federal government, particularly where their obligation not to charge the federal government, schools and libraries more than LCP has been clear since at least 1997.

ARGUMENT

A. There Is No Need For The Commission To Clarify The Lowest Corresponding Price Obligation, And The Commission Should Reject Petitioners' Flawed Assertion That The LCP Obligation Only Applies When A Form 470 Is Filed

Whether or not a school or library must initiate a new competitive bidding process (by filing a Form 470) in every case is beside the point. Regardless of whether a Form 470 is needed or used by a particular school or library, a service provider still certifies LCP compliance and completes Form 473 to obtain reimbursement from the federal government. Notably, Form 473 is completed and submitted entirely *by the service provider* without any involvement by the schools or libraries, and it is *the service provider alone* who certifies that the invoices submitted to the federal government for reimbursement comply with the

LCP requirement. Any effort to shift the blame for a service provider's false certifications and lack of regulatory compliance to schools or libraries is astonishingly callous and irresponsible.

Notably, the LCP requirement was adopted, in part, because the Commission recognized that schools and libraries are at a disadvantage because of their "lack of experience in negotiating in a competitive telecommunications services market." 1997 Universal Service Order, ¶ 484. Moreover, the Commission has made it clear that a service provider's LCP obligation exists both in competitive and *non*-competitive markets. *Id.*, ¶ 485 (LCP is "upper limit that carriers can charge schools and libraries in *non-competitive markets*, as well as competitive markets…") (emphasis supplied). In competitive markets, the LCP requirement helps schools (and, by extension, the federal government) to obtain favorable pricing for the telecommunications services they need. However, in *non*-competitive markets, the LCP requirement takes on *even greater importance*.

The need for service providers to comply with LCP in *both* competitive and non-competitive markets (without regard for whether a Form 470 has been, or needs to be, completed and filed) should be self-evident. Indeed, the Commission recognized this fact in the 1997 Universal Service Order, which discussed the fact that, despite efforts to promote competition, there are still *non*-competitive markets in the telecommunications industry, and service providers doing business in these non-competitive markets are still entitled to seek E-Rate reimbursement. *See*, 1997 Universal Service Order, ¶¶ 451-455, 485 (discussing "the cost of internal connections" as being a "significant barrier to technology deployment" needed to allow for truly competitive markets, but stating that the 1996 Act "does not distinguish between competitive and non-competitive services in developing a program to establish explicit universal service support mechanisms").

Given the fact that service providers can obtain E-Rate reimbursement for services offered in both competitive and *non*-competitive markets, the Petitioners' suggestion that a service provider's LCP obligation *only* applies in competitive markets (and, moreover, only when a Form 470 is filed) makes no logical sense, and is inconsistent with the framework of the E-Rate Program. As set forth above, in many cases, schools and libraries are not required to file Form 470 because a "qualified existing contract" is involved. *See, infra* at 2-4. In addition, in *non*-competitive markets (including markets where incumbent LECs "own the copper" and effectively control the "dial tone"), a school or library may believe there is no need to file a Form 470, because it serves no practical purpose where there is no meaningful (or any) competition for such services.

Again, whether or not a school or library might violate E-Rate rules by failing to file a form a Form 470 is beside the point. The failure of a school or library to file a Form 470 may, in and of itself, be a violation of E-Rate in some cases, for which *the school or library* might be held legally responsible (if the Commission and/or USAC decides to audit and enforce this requirement). *However*, a service provider's obligation to certify that the prices it charges a school or library (not to mention the federal government) are no more than its LCP is separate and distinct. *See* 47 C.F.R. §54.511(b) (service provider shall not charge more than LCP); 1997 Universal Service Order, ¶ 487 (certification of LCP is a "condition of support" under E-Rate). In addition, when a service provider chooses to seek E-Rate funding from the federal government and files Form 473, it is certifying that its charges to schools and libraries (including those set forth in the invoices submitted to the government along with the Form 473) are not in excess of the service provider's LCP. Instructions to FCC Form 473, p. 1.

In recent years, the continued development of technology and infrastructure associated with voice-over-internet-protocol ("VOIP") has brought the potential for some

measure of competition to some of these historically non-competitive markets (*i.e.*, for monthly line charges and dial tone), but, for the last decade or more, service providers (specifically LECs, such as AT&T and Verizon) have had a distinct competitive advantage (if not complete dominance) in markets for certain services because they control the internal wiring and "dial tone" at many schools and libraries. Indeed, in some cases, schools and libraries have had *no choice* as to the service providers for such services (*i.e.*, "dial tone" and local calling) other than the incumbent LEC that controls their geographic territory.

In December 2009, the Commission took steps to promote the use of VOIP by schools and libraries under the E-Rate Program. *See*, Report and Order on Universal Service dated December 2, 2009, FCC 09-105. Even in 2010, however, there continue to be challenges with VOIP in some areas of the country, and some schools still have no viable option but to use the incumbent LEC for their "dial tone" and local calling. Indeed, it is the relatively non-competitive environment for such services that has created the potential for (and, in many cases, has led to) service providers charging schools and libraries *substantially* more than LCP for local calling and "dial tone" services, despite their obligations of E-Rate.

The Petitioners' emphasis of the obligations of schools and libraries to file Form 470 is a classic case of misdirection. If schools and libraries fail to do what is required *of them* (*i.e.*, by failing to file a Form 470, when required), they might be subjected to their own audits and potential enforcement action by USAC and/or the Commission. But, here, it is the *service providers* who are being audited by USAC (as they admit in the Petition) and it is *their* obligations (not those of the schools) regarding LCP and *their* associated certifications that are at issue.

Moreover, the Petitioners' suggestion that service providers are somehow confused about whether or not a particular school or library is eligible for LCP is disingenuous, and

again misses the point.[1] As a practical matter, the service providers are the companies that are pushing the E-Rate Program in dealings with schools and libraries, not the other way around. Moreover, even if the opposite was true, the service providers certainly knows that they are participating in the E-Rate Program (and required to make truthful certifications concerning LCP) when they prepare invoices for reimbursement by the federal government and/or submit a Form 473 (attaching invoices) to the federal government.

As set forth above, a service provider's obligations not to charge schools and libraries more than LCP and to certify compliance with its LCP obligations, particularly when it files Form 473 (attaching invoices) or otherwise seeks reimbursement from the federal government under E-Rate, are eminently clear. If a service provider chooses to provide services to schools and libraries (in either competitive or non-competitive markets) and files Form 473 or otherwise seeks reimbursement under E-Rate, it is certifying that the price being charged to the school or library (and the federal government) is the service provider's LCP. These fundamental obligations are clear (and have been since at least 1997), and they are not contingent on whether a school is required to, or actually does, initiate a competitive bidding process by filing a Form 470.

For these reasons, the Commission should deny the Petition and should decline to provide the Petitioners with the declaratory relief they seek, particularly where the request for relief appears to be part of an effort to avoid responsibility for false certifications of LCP compliance made over many years.

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[1]At some points in the Petition, it is suggested that schools and libraries are seeking services involving "wireless rates at retail stores." *See* Petition, p. ii. It is difficult to believe that a significant portion of the charges reimbursed under E-Rate involve "wireless rates at retail stores," particularly where any audit of charges submitted by service providers under E-Rate (including, presumably, the audits currently being performed by USAC) will reveal that the vast majority of a school's monthly phone charges involve (1) monthly per-line (dial tone) charges, and (2) local calling charges. "Wireless rates" provided at "retail stores" are not the issue, and the Commission should not be misled into believing otherwise.

B. Petitioners' Arguments Concerning Their "Continuing Obligation" to Charge LCP Are Also Misguided

The Petitioners next request that the Commission declare that service providers have no "continuing obligation" to change the agreed price to reflect changes to LCP during the term of a service contract with a school or library. Petition, p. iii . The Petitioners do not make it clear why they believe declaratory relief on this issue is necessary. Indeed, the Commission's prior rulings on the criteria that must be considered by a service provider when determining LCP appear to be abundantly clear. *See*, 1997 Universal Service Order, ¶ 485 (in determining LCP, service providers must consider prices they charged for "similar services," including those provided "under [other] contract[s] as well as those provided under tariff."); ¶ 489 (creating rebuttable presumption that "rates offered within the previous three years are still compensatory"); *see also*, Fourth Reconsideration of 1997 Universal Support Order, ¶ 142 (earlier versions of a service provider's tariffs, which have been modified, should be considered by service providers in determining LCP). Again, as with the other issues presented by this Petition, the Petitioners and their members sought no clarification on these issues for thirteen (13) years, and they apparently do so now only because they wish to find some basis to avoid responsibility for their failure to take their LCP obligations seriously for more than a decade, all of which is presumably coming to light in the current USAC audits.

As was made clear in 1997, given the relative lack of experience of schools and libraries in negotiating for telecommunications services, when a service provider makes a contractual "offer" to provide eligible services to a school or library, the Commission requires the provider to "*offer* services to eligible schools and libraries at prices no higher than the lowest price it charges to similarly situated non-residential customers for similar services," or LCP. 1997 Universal Service Order, ¶ 484 (emphasis supplied). Accordingly,

it is clear that when a service provider enters into a contract to provide services to a school or library (whether the contract is renewed on a monthly, annual, for multi-year basis), it has a clear legal obligation to charge no more than LCP at the outset of that contract. Moreover, when that contract renews (whether it is the next month, or in three years), the service provider is again obligated to "offer" its services at no more than LCP in the new or renewed contract. *Id.* There is no need for the Commission to clarify the law on these issues. To the extent the Petitioners are asking the Commission to declare that service providers can charge schools and libraries *more than* the promised LCP *after* entering into the contract but *before* the contract expires or renews, that position finds no support in E-Rate law.

How such a situation might arise is unclear from the Petition. It would seem that any contract (regardless of its term) between a service provider and a school or library that sets forth a price for services (presumably LCP, since that is what the law requires) would need to be honored by the service provider throughout the term of that agreement, and the service provider could not charge (during the contract's term) a price in excess of the agreed amount (again, presumably LCP). When the contract expires or the term renews, then, at that time, the agreed contract price might be adjusted to reflect the service provider's then-existing LCP. This hardly seems to be a matter that is unclear, however, or for which a declaratory ruling is necessary.

Reading between the lines, the Petitioners may be seeking to allow service providers to "lock in" some contracted price that they believe is favorable (perhaps based, on contracts entered into many years ago), without ever having to adjust the contract price to reflect LCP at the time of the contract's renewal. However, as set forth above, service providers have a clear statutory and regulatory obligation to charge no more than LCP, and that obligation arises, at a minimum, each time the service provider makes a new pricing "offer"

to schools (whether new prices are offered on a monthly basis under a month-to-month agreement with no defined contractual term, or when annual or multi-year contracts come up for renewal), particularly where the service provider intends to (or does) seek E-Rate reimbursement for such charges.

Notably, regardless of whether the Commission decides that some "clarification" of the above is necessary (despite the 1997 Universal Service Order's reference to a service provider's duty to "offer" LCP at the time of contract formation), the undeniable fact remains that, whenever a service provider submits a Form 473 to the federal government or otherwise seeks reimbursement of charges for eligible services under E-Rate, the provider is necessarily certifying compliance with the applicable E-Rate rules, including the LCP requirement. Universal Service Order, ¶ 487. As explained herein, such a certification is a *condition of receiving funds*, as the Commission made clear in 1997:

> [W]e agree with the Joint Board's recommendation that, *as a condition of receiving support*, carriers be *required to certify* that the price they offer to schools or libraries is no greater than the lowest corresponding price based on the prices the carrier has previously charged or is currently charging in the market.

Universal Service Order at ¶ 487 (emphasis supplied); *see also* Instructions to FCC Form 473, p. 1 (Form 473 must be completed by each service provider "to confirm that the invoice forms submitted by each service provider are in *compliance with the FCC's rules* governing the schools and libraries universal service support mechanism") (emphasis supplied).

As a result, service providers that participate in E-Rate and/or seek reimbursement under the program enter into contracts with their school and library customers knowing that they cannot charge those customers more than LCP. Whether a service provider "offers" services to a school or library on a multi-year, annual or some other periodic basis, the prices it charges must not exceed LCP (as of the date of the contract or contract renewal), particularly if the provider intends to seek reimbursement from USAC. If

industry prices go up during a contract year, then the LCP may also go up at the time of contract renewal. If industry prices go down, however, then the federal government, schools and libraries are entitled to benefit from the reduction in LCP. To suggest, as Petitioners apparently do, that service providers can "lock" a school into a contracted rate, and then ignore changes in LCP each time the contract renews, finds no support in the applicable statute or regulations.

C. Petitioners' Argument That Service Provider Need Not Maintain Records Or Take Steps To Demonstrate Regulatory Compliance Is Also Misguided

The Petitioners also ask the Commission to declare that service providers have no duty to maintain records or follow any procedures to verify or ensure compliance with their LCP obligations. As with its other assertions, this one finds no support in the law.

The Commission has made it abundantly clear that service providers have a duty to charge no more than LCP. As set forth above, since at least 1997, services providers have known that they (*not* schools) must certify their compliance with the LCP requirement "as a condition of receiving support" under E-Rate. *See*, 1997 Universal Service Order, ¶ 487. To suggest, as the Petitioners apparently do, that service providers need not comply with the long-standing LCP requirement because there are no "specific procedures that a service provider must use to ensure compliance" is entirely irresponsible, particularly where those providers have received hundreds of millions of dollars in revenue from the federal government under E-Rate. Petition, p. iii.

The Petitioners misleadingly suggest that they have no duty to comply with LCP because the Commission allegedly has not made the duty to comply clear or mandatory. Again, this argument ignores the clear requirements of E-Rate law, which have been in place since at least 1997. The 1996 Act made it clear that *all* service providers participating in E-Rate had a *statutory duty* to charge schools and libraries "at rates *less*

than the amounts charged for similar services to other parties." 47 U.S.C. § 254(h)(1)(B) (emphasis provided). Similarly, the Commission has mandated that *all* service providers charge prices that do not exceed "the lowest price that a service provider charges to non-residential customers who are similarly situated to a particular school, library or library consortium for similar services." *See*, 47 C.F.R. §54.511(b) (mandating that service providers "shall not charges schools…a price that is above the lowest corresponding price…"). In addition, the Commission clearly stated in the 1997 Universal Service Order that service providers "are *required to certify*" LCP compliance "as a condition of receiving support" under E-Rate. 1997 Universal Service Order, ¶ 487 (emphasis supplied). It is difficult to imagine that the Commission's guidance on this subject could be any more clear. When a service provider seeks E-Rate support and submits a Form 473 (with attached invoices), it is certifying that the prices charged and for which reimbursement is sought reflect the service provider's LCP, such that the schools, libraries and federal government are not being overcharged. *See*, Instructions to FCC Form 473, p.1

In addition, as the Petitioners admit, the applicable regulations specifically require service providers to retain pricing information for "*at least*" five years. 47 C.F.R. §54.516(2). In addition, this same regulation specifically requires all service providers to retain "[a]ny other document that demonstrates compliance with the statutory or regulatory requirements" for the E-Rate Program. *Id.* The need for service providers to keep records and take appropriate steps to demonstrate compliance with the LCP requirement of E-Rate should come as no surprise whatsoever. The service providers are highly regulated entities, and they certainly understand the importance of putting procedures in place to demonstrate compliance with the law.

If the service providers made no serious effort to keep such records or to ensure compliance with LCP requirements before filing false Form 473 certifications, then that is

simply inexcusable. Certainly, the Commission should not excuse any intentional or reckless misconduct by the service providers, or be taken in by their false suggestion that the law has not been sufficiently clear on the need to certify LCP compliance. The Petitioners and their members have taken full advantage of the E-Rate Program and its generous funding to the tune of hundreds of millions or billions of dollars over the last decade, and their supposed need for clarification of the law comes only now, after USAC has started audits and requested that they demonstrate compliance with the law.

D. Petitioners' Arguments Concerning Bundling Have Been Addressed By The Commission, And No Clarification Is Necessary

The Petitioners next suggest that the bundling of telecommunications services makes it impossible for them to certify compliance with E-Rate. Like their other arguments, this one is also misleading and unsupportable. The Commission has made it eminently clear that service providers cannot avoid their LCP obligations simply due to the bundling of services or products. As the Commission clearly stated in 1997:

> Providers may not avoid the obligation to offer the lowest corresponding price to schools and libraries…by arguing that none of their non-residential customers are *identically* situated to a school or library or that none of their service contracts cover services *identical* to those sought by a school or library. Rather we *only* permit providers to offer schools and libraries prices above the prices charged to other similarly situated customers *when those providers can show* that they face significantly higher costs to serve the school or library seeking service [as compared to the costs incurred to service the similar customer].

1997 Universal Service Order, ¶ 488 (emphasis supplied). In addition, the 1996 Act and E-Rate regulations also make it clear that, when a service provider is determining the pre-discount price to be charged to a school or library (LCP), it must consider prices charged to similar non-residential customers for *"similar"* (but not necessarily *identical*) services. 47 U.S.C. § 254(h)(1)(B) (referencing charges for "similar services"); 47 C.F.R. §54.511(b) (also referencing charges for "similar services").

Where two similar customers receive similar or identical services (*i.e.*, basic monthly per-line charges, or "dial tone"), then the prices offered and charged by that service provider to similar customers need to be considered by that provider when determining LCP. If the Petitioners' position on bundling was accepted, then service providers could routinely avoid compliance with the LCP requirement by asserting that there is always some difference (even a modest one) between two "bundles" of services provided to two customers (*i.e.*, one has more telephone extensions, or has some ancillary service that the other does not have). The Commission has been clear that this is not allowed. *See*, 1997 Universal Service Order, ¶ 488 (quoted above); *see also* ¶ 482 (rejecting suggestion that service provider must bid on services on an "unbundled basis"); ¶ 461 (recognizing the need to unbundle eligible and ineligible services to determine what can be reimbursed under E-Rate).

Again, these issues have been addressed, and the Commission should not give the Petitioners the opportunity to assert that they could not reasonably comply with the LCP requirement because of some alleged need for clarification in this area.

E. Petitioners Cannot Avoid Responsibility For Their Own False Certifications By Attempting To Put The Blame On Others

The Petitioners also suggest that are excused from complying with the LCP requirement (including their duty to certify compliance when requesting payment under the E-Rate Program) unless schools and libraries *first* prove that service providers charged them more than LCP. Petition, p. iv. This self-serving proposition is not supported by the language of the 1996 Act or E-Rate regulations, and it is inconsistent with the 1997 Universal Service Order and basic principles of law enforcement. If a service provider violates the law by knowingly making false and misleading certifications to the federal government, it should not be excused from that liability simply because a school or library was ill-equipped to catch them violating the law. As set forth above, the 1997 Universal

Service Order clearly states that *service providers* cannot charge more than LCP unless "*those providers* can show" that the LCP requirement should *not* apply. 1997 Universal Service Order, ¶ 488 (emphasis supplied).

The burden is *not* on the schools to uncover a service provider's false certifications and overcharging activity, and there is simply nothing in E-Rate law to suggest that the *service providers'* obligations to charge LCP and to certify LCP compliance are not triggered unless a school or library first proves it is not receiving LCP. Notably, the entity most capable of knowing whether a particular school or library is receiving a service provider's LCP is the service provider itself, which has ready access to pricing information for all of its customers.

For these reasons, the Commission should not grant the Petitioners the declaratory relief they seek on this issue.

F. The Petitioners' Real Objective Is To Suggest That Some Ambiguity Exists, So That They Might Create Some Excuse Allowing Them To Avoid Liability To The Government For Making Knowingly False Certifications, And The Commission Should Not Accommodate Them

The final section of their Petition reveals something about the Petitioners' true motives. Notably, they ask the Commission to declare that their obligations to comply with E-Rate law (as allegedly "clarified" by the Commission) exist only on a going-forward basis. Again, the Petition was filed in the context of USAC performing audits, which appear to seek information from service providers to demonstrate that they made reasonable efforts to comply with their LCP obligations. Given this context, it becomes clear that the service providers want to use a ruling from the Commission to support a contention that E-Rate law (as it pertains to the matters above) was unclear for more than a decade, in the hopes of excusing their false certifications of LCP compliance and a complete disregard for applicable law and the Commission's prior rulings on these issues.

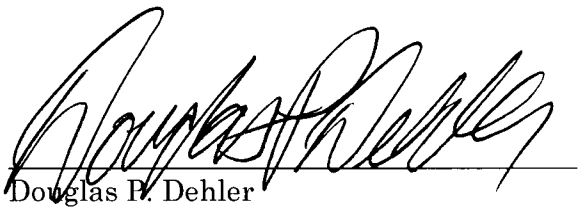
For the reasons set forth above, the issues presented by this Petition have been clearly addressed, and the Commission should not accommodate service providers who made no effort to comply with the law by promoting or accepting the Petitioners' false premise that E-Rate law concerning these matters was unclear.

CONCLUSION

As set forth above, the issues presented by the Petition have been clearly addressed since at least 1997, and the Commission should deny the Petition in its entirety. If the Commission decides to address any of these issues, it should unambiguously declare that the E-Rate law on these issues is already clear and has been clear for more than a decade. The service providers did not seek "clarification" of these issue for thirteen (13) years, and their filing of the Petition at this stage is nothing more than a thinly-veiled attempt to frustrate the audits being performed by USAC and to avoid responsibility for knowingly false certifications of LCP compliance made in connection with their requests for E-Rate reimbursement based on charges that they either knew or should have known were substantially in excess of LCP.

Dated this 14th day of May, 2010.

SHEPHERD, FINKELMAN, MILLER & SHAH, LLP



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